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SUPREME COURT
STATE OF WASHINGTON

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RONALD R. CARPENTER

No. 80547-4

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

JOHNATHON D. ROSWELL

SUPPLEMENTAL BRIEF OF APPELLANT

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ORIGINAL

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A. Supplemental Argument

This Court has granted review to determine whether Washington law mandates, or even permits, bifurcated trials when the existence of one or more misdemeanors elevates an offense to a felony. In his petition for review, Mr. Roswell pointed out that there are at least fifteen crimes that become felonies upon proof of one or more misdemeanors.¹ While some of these crimes are rarely charged, several of these crimes are charged regularly as felonies. In particular, this Court's disposition of Mr. Roswell's case will have a tremendous impact on three common offenses: felony violation of a no contact order, felony DUI, and felony communication with a minor for immoral purposes.

The tension giving rise to this appeal arises from the defendant's right to a fair trial and the State's right to present evidence proving its case. On the one hand, there is a significant danger that the jury, after hearing evidence of multiple prior offenses of a similar character, will

¹ RCW 9.68A.090 (communication with a minor for immoral purposes); RCW 9A.46.110(5)(b) (stalking); RCW 9A.46.020(2)(b) (harassment); RCW 9.61.230 (telephone harassment); RCW 9.61.260 (cyberstalking); RCW 26.50.110(5) (violation of no contact order with two priors); RCW 46.61.502(6) (DUI with four priors); RCW 9.16.035(3) (counterfeiting with two priors); RCW 9A.88.010 (indecent exposure); RCW 9.68.060 (distribution of erotic material with two priors); RCW 19.25.030(2)(a) (use of recordings of live performance without consent); RCW 10.66.090 (willful violation of PADT order); RCW 77.15.410 (unlawful hunting of big game); RCW 77.15.450 (spotlighting big game); RCW 90.56.300 (unlawful operation of onshore or offshore facility).

assume the defendant has a propensity for such offenses. As the California Supreme Court put it when discussing the identical issue, "Evidence that involves crimes other than those for which a defendant is being tried is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense." People v. Calderon (1994) 9 Cal.4th 69, 75, 36 Cal. Rptr. 2d 333, 885 P.2d 83 (1994).

The prejudice created by the use of such propensity evidence is well-illustrated by Mr. Roswell's case. During his trial, the State brought a motion to introduce evidence of Mr. Roswell's prior sex offense under ER 404(b). The trial court found that the evidence was more prejudicial than probative. But later, the State was permitted to introduce evidence that Mr. Roswell has a prior felony sex offense conviction. While the jury did not hear the details of the offense, the jury was allowed to hear evidence that the trial court had determined was highly prejudicial.

On the other hand, the State has the right to present evidence in an effort to prove all the elements of the offense. In the case of the above-mentioned fifteen offenses, one of the elements is the proof of one or more similar offenses.

Mr. Roswell's proposed remedy for the tension created by these statutes is the use of bifurcated trials. This remedy eliminates the tension

because, on the one hand, the jury does not hear propensity evidence during the State's case-in-chief. On the other hand, the State is given adequate opportunity to prove all the elements of the offense. There are three considerations this Court should consider in its analysis: overriding constitutional concerns, the statutory structure, and the Court's inherent supervisory authority. All three of these considerations lead inexorably to one conclusion: trials involving these felony offenses should be bifurcated.

1. The Constitution requires the bifurcation of the trial in order to prevent the introduction of irrelevant and prejudicial evidence.

A defendant has a due process right that irrelevant and highly prejudicial evidence not be introduced to the jury. For instance, it is reversible error for a prosecutor to introduce evidence that the defendant invoked his right to remain silent. Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). In Mr. Roswell's case, we know that the evidence of his prior felony sex offense was irrelevant and prejudicial because the trial court so found in ruling on the State's ER 404(b) motion.

A defendant should not be placed in the position of choosing between a trial where the State proves all the elements of the offense through the use of irrelevant and prejudicial evidence and a trial where the

State is not required to prove all the elements of the offense. As this Court has said, “Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.” State v. Hughes, 154 Wn.2d 118, 133-34, 110 P.3d 192 (2005), citing Blakely v. Washington, 542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004). Bifurcated trials strike the correct constitutional balance.

2. Bifurcated trials are consistent with the statutory scheme.

In response to the United State Supreme Court’s decision in Blakely, the Washington legislature amended RCW 9.94A.535 and RCW 9.94A.537, the exceptional sentence statutes. The amended statutory scheme creates a procedure for bifurcated trials when the prejudice created by the introduction of evidence of the aggravating factor substantially outweighs its probative value. Specifically, RCW 9.94A.537(4) reads:

Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed

by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

The legislature anticipated the need for bifurcated trials for four aggravating factors set out in RCW 9.94A.535(3): subsection (e)(iv) ("The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy"; subsection (h)(i) ("The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time"); subsection (o) ("The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment"); subsection (t) ("The defendant committed the current offense shortly after being released from incarceration"). The obvious trend for all four of these aggravating circumstances is that trials should be bifurcated when the evidence supporting the aggravating factor would be inadmissible under ER 404(b).

RCW 9.94A.535(3)(o) is particularly applicable to Mr. Roswell's case. Had the State sought to increase Mr. Roswell's maximum penalty (i.e. exceed the top of the standard sentencing range) by proving that he has a history of sex offenses, he would have been entitled to a bifurcated trial. But because the State sought to increase the maximum penalty by increasing the offense from a misdemeanor to a felony, the State was

allowed to introduce the evidence of the prior sex offense during its case-in-chief. The statutory scheme supports the position that Mr. Roswell should have had a bifurcated trial.

3. This Court should exercise its inherent supervisory powers and order bifurcated trials when a misdemeanor is increased to a felony due to the existence of one or more prior offenses.

Should this Court conclude that bifurcated trials are neither constitutionally mandated nor statutorily required, this Court should still reverse Mr. Roswell's conviction under its inherent authority to provide oversight over the courts of this State. This Court has the inherent supervisory power to oversee the administration of justice. State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). This Court has exercised that authority in appropriate situations since the early days of statehood. State ex rel. Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928). In Bennett, this Court ordered that use of Washington's Pattern Jury Instruction defining reasonable doubt shall be used in all future criminal trials, even though non-conforming jury instructions are constitutionally permitted.

When faced with the issue of bifurcated trials, the California Supreme Court exercised its inherent authority to authorize such trials in order to prevent unfair prejudice. People v. Calderon (1994) 9 Cal.4th 69,

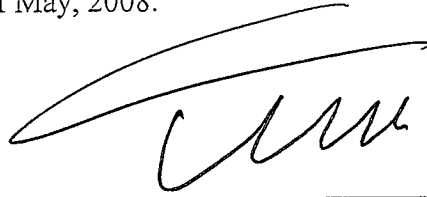
75, 36 Cal. Rptr. 2d 333, 885 P.2d 83 (1994). In Calderon, the California Supreme Court stated, "It is clear, therefore, that a trial court, through the exercise of its general powers under section 1044, *may* order that the determination of the truth of a prior conviction allegation be determined in a separate proceeding before the same jury, after the jury has returned a verdict of guilty of the charged offense." Calderon at 75. Bifurcated trials are appropriate, according to the California Court, when evidence of an alleged prior conviction during the trial of the "currently charged offense would pose a substantial risk of undue prejudice to the defendant." Calderon at 77.

Mr. Roswell did not receive a fair trial when the jury was allowed to hear in the State's case-in-chief that he had a felony sex offense on his record, even though the facts of that offense were more prejudicial than probative. This Court should reverse his conviction.

B. Conclusion

This Court should reverse Mr. Roswell's judgment and sentence and remand for a new trial.

DATED this 22nd day of May, 2008.

A handwritten signature in black ink, consisting of a large, sweeping initial 'T' followed by several loops and a final flourish.

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